Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Infrastructure Development by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

OPPOSITION OF NCTA – THE INTERNET & TELEVISION ASSOCIATION TO PETITIONS FOR RECONSIDERATION

NCTA – The Internet & Television Association (NCTA) opposes the petitions for reconsideration of the *Third Report and Order and Declaratory Ruling*[1] filed by the Coalition of Concerned Utilities (CCU), the City of New York (New York), and the Smart Communities and Special Districts Coalition (Smart Communities) in the above-captioned proceeding.[2] For the reasons explained in this Opposition, the Commission should reaffirm both its policy on overlashing of pole attachments and its decision that state and local moratoria on the deployment of telecommunications services and facilities violate Section 253(a) of the Act.

INTRODUCTION & SUMMARY

In the *Third Report and Order and Declaratory Ruling*, the Commission took a number of steps in its continued efforts to "promote broadband deployment by speeding the process and reducing the costs of attaching new facilities to utility poles."[3] Among those steps, the

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1 *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, FCC 18-111 (rel. Aug. 3, 2018) (*Third Report and Order and Declaratory Ruling*).

2 Petition for Reconsideration of the Coalition of Concerned Utilities (filed Oct. 15, 2018) (CCU Petition); Petition for Reconsideration of the City of New York (filed Sept. 4, 2018) (New York Petition); Petition for Reconsideration of the Smart Communities and Districts Coalition (filed Sept. 4, 2018) (Smart Communities Petition).

3 *Third Report and Order and Declaratory Ruling* ¶ 1.

Commission codified and refined its longstanding precedent that requires utilities to allow overlashing of poles.[4] In addition, the Commission adopted a declaratory ruling making clear that state and local moratoria on the deployment of telecommunications services or facilities violate Section 253 of the Act.[5]

CCU, New York, and Smart Communities now seek reconsideration of the *Third Report and Order and Declaratory Ruling* with respect to overlashing and moratoria. Specifically, CCU argues that the Commission overlooked record evidence regarding safety and reliability issues in reaching its decision on overlashing. The New York and Smart Communities Petitions argue that the Commission had no legal or factual basis for its declaratory ruling that state and local moratoria are prohibited by Section 253(a).

All three petitions should be denied. The Commission explicitly acknowledged and addressed the safety and reliability issues raised in the record in fashioning the overlashing rules it adopted. And the Commission's interpretation of Section 253 was well-reasoned and based on ample factual record evidence regarding moratoria. Accordingly, the Commission should reject the CCU, New York, and Smart Communities Petitions.[6]

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4 *See id*. ¶¶ 2-3.

5 *See id*. ¶ 4.

6 A fourth Petition for Reconsideration was filed by the County Road Association of Michigan, which takes issue with the Commission's characterization of Michigan's seasonal road weight restrictions as the type of conduct prohibited by Section 253. *See* Petition for Reconsideration of County Road Association of Michigan (filed Sept. 4, 2018). Notwithstanding the arguments in that Petition, the Commission's decision with respect to moratoria is supported by ample other record evidence of states and localities imposing moratoria on the deployment of telecommunications infrastructure in violation of Section 253. *Third Report and Order and Declaratory Ruling* ¶ 1.

I. THE COMMISSION SHOULD REJECT UTILITY REQUESTS FOR UNREASONABLE PROCEDURAL REQUIREMENTS PRIOR TO OVERLASHING

NCTA explained in its comments that "the Commission's policy of encouraging unrestricted overlashing, including its decision to prohibit prior approval requirements for overlashing, is a critical element of the regulatory foundation on which hundreds of billions of dollars of new investment have been made."[7] In the *Third Report and Order and Declaratory Ruling*, the Commission recognized the importance of overlashing and codified its "longstanding policy that utilities may not require an attacher to obtain its approval for overlashing."[8] The Commission also adopted a rule that "allows utilities to establish reasonable advance notice requirements."[9] Specifically, utilities "may, but are not required to, establish reasonable pre-notification requirements including a requirement that attachers provide 15 days (or fewer) advance notice of overlashing work."[10]

In its petition for reconsideration, CCU reiterates old arguments that overlashing can be unsafe and that the Commission erred by not permitting utilities to require that attachers obtain prior approval for overlashing.[11] CCU points to alleged safety concerns that were raised in comments filed by utilities and suggests that the Commission erroneously found these concerns to be insignificant.[12] Far from ignoring CCU's concerns about safety, however, the Commission specifically acknowledged that some of these concerns were "valid and supported by the

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7 Comments of NCTA – The Internet & Television Association, WC Docket No. 17-84 (filed Jan. 17, 2018).

8 *Third Report and Order and Declaratory Ruling* ¶ 115.

9 *Id*.

10 *Id*. ¶ 116.

11 CCU Petition at 10-12.

12 *Id.* at 11. In particular, CCU points to evidence it claims demonstrates "dangerous and destructive accidents" involving overlashing and asserts that overlashing can lead to a variety of unsafe conditions that violate the NESC. *Id.* at 11-12.

record."[13] The Commission explicitly addressed these concerns by adopting a new rule that permits utilities to require reasonable advance notice of any overlashing work, thereby providing the utility an opportunity to review any proposed overlashing work and raise legitimate safety concerns before such work takes place.[14]

Pointing to record evidence of situations in which advanced notice has successfully addressed those concerns, the Commission found "that an advance notice requirement has been sufficient to address safety and reliability concerns, as it provides utilities with the opportunity to conduct any engineering studies or inspections either prior to the overlash being completed or after completion."[15] These same safety and reliability concerns are also the reason the Commission rejected other potential frameworks for overlashing.[16] Thus, CCU's suggestion that the Commission disregarded safety and reliability concerns ignores that such concerns were weighed carefully and explicitly addressed in the *Third Report and Order and Declaratory Ruling*.

The Commission also reiterated its consistent finding that "overlashers must ensure that they are complying with reasonable safety, reliability, and engineering practices"[17] and it required an overlashing party to "notify the affected utility within 15 days of completion of the overlash" and "provide the affected utility at least 90 days from receipt in which to inspect the

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13 *Third Report and Order and Declaratory Ruling* ¶ 116.

14 *See id*.

15 *Id*. ¶ 117; *see also id*. ¶ 118 ("Providing the utility with advance notice of overlashing will allow it to better monitor and ensure the safety, integrity, and reliability of its poles . . . .").

16 *Id*. ¶ 118 ("While attach-and-notify advocates assert that advance notice is time-consuming, cumbersome, and inefficient, we find the burden of advance notice minimal compared to the importance of insuring that any new overlashed facilities will not compromise the safety or integrity of existing electric distribution and communications infrastructure.").

17 *Id*. ¶ 119.

pole."[18] The Commission's policy of holding overlashers responsible for the quality of the work they perform, combined with the opportunity for the utility to require reasonable advance notice prior to the work and the ability of the utility to inspect the work and hold the attacher responsible for problems, is sufficient to minimize the occurrence of safety issues and quickly address any such issues that may occur.

CCU states that if the Commission does not grant its request for permission to impose prior approval requirements, it should at least permit utilities to: (1) require engineering studies as part of any advance notice requirement; (2) require the identification of all materials to be overlashed as part of any advance notice requirement; and (3) require that a licensed Professional Engineer certify that the proposed overlashing complies with the National Electric Safety Code (NESC).[19] CCU has failed to provide justification for any of these requests. Given that the Commission took full account of utilities' safety concerns, the additional burdens proposed by CCU are not necessary for safety reasons and primarily would have the effect of delaying and significantly increasing the cost of broadband deployment.[20] The Commission already determined that requiring overlashers to incur additional engineering and inspection costs for work undertaken by the utility would unduly slow deployment and CCU provides no new justification for imposing such a requirement.[21]

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[18] *Id*. ¶ 120.

[19] *See* CCU Petition at 12.

[20] *Third Report and Order and Declaratory Ruling* ¶ 115 (explaining that use of overlashing can represent the difference between meeting customer needs "within weeks versus six or more months" if a wholly new attachment is required).

[21] *Id.* ¶ 116 & n.431.

The Commission also should deny CCU's request that it reconsider its decision that pole owners may not deny overlashing based on preexisting violations on the pole.[22] The Commission correctly clarified that utilities cannot deny access solely based on safety concerns arising from a pre-existing violation. The Commission has been consistently clear that a new attacher is never responsible for paying to fix a pre-existing safety violation.[23] However, the Commission balanced safety concerns related to overlashing where there is a preexisting violation with the efficiency gains from deployment via overlashing by requiring overlashers to repair any damage caused by the overlashing.[24] Thus, the Commission created a strong incentive for overlashers to take great care not to overlash where doing so would cause damage.[25]

Accordingly, the Commission appropriately balanced efficiency and safety concerns in the rules it adopted and it should reject CCU's request to reconsider or modify its ruling with respect to overlashing.

II. THE COMMISSION SHOULD REJECT MUNICIPAL REQUESTS TO RECONSIDER THE PREEMPTION OF STATE AND LOCAL MORATORIA

In the *Third Report and Order and Declaratory Ruling*, the Commission adopted a declaratory ruling that state and local moratoria "on the deployment of telecommunications services or telecommunications facilities, including explicit refusals to authorize deployment and

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22 *See* CCU Petition at 12-13.

23 *See Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd. 24615, 24625, ¶ 26 (2003); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA 99-002, Consolidated Order, 14 FCC Rcd. 11599, 11606-07, ¶ 19 (CSB 1999).

24 *Third Report and Order and Declaratory Ruling* ¶ 116 & n.429 ("A utility may not deny access to overlash due to a pre-existing violation on the pole. However, a party that chooses to overlash on a pole with a safety violation and causes damage to the pole or other equipment will be held responsible for any necessary repairs.").

25 Moreover, the *Third Report and Order and Declaratory Ruling* already provides for an opportunity for the pole owner to require the overlasher to make the pole safe for overlashing at the overlasher's expense. *Id.* ("To the extent a utility can document that an overlash would require modifications to the pole or replacement pole, the overlasher will be held responsible for the costs associated with ensuring that the pole can safely accommodate the overlash.").

dilatory tactics that amount to *de facto* refusals to allow deployment . . . violate section 253(a) and strike at the heart of the ban on barriers to entry that Congress enacted in that provision."[26]

In their petitions, New York and Smart Communities argue that there is no legal or factual basis for the Commission's declaratory ruling. Specifically, they assert that the Commission erred in its legal analysis, both in reading the prohibition in Section 253(a) to cover situations where a local government does not permanently prohibit an entity from providing telecommunications services and by reading the savings clauses in Sections 253(b) and (c) more narrowly than intended by Congress.[27] The Smart Communities Petition also argues that the illustrative examples of moratoria identified by the Commission provide no factual basis for the declaratory ruling.[28]

The Commission should reject the New York and Smart Communities Petitions. The Commission has clear authority to interpret the Act generally,[29] and Section 253 in particular,[30] and its decision that express and *de facto* moratoria violate Section 253(a) was well-reasoned and based on the ample factual record in this proceeding. After acknowledging the numerous examples of state and local moratoria in the record, the Commission explained that "[e]xpress moratoria are facially inconsistent with section 253(a). By their terms, express moratoria prohibit the provision of telecommunications services by halting the acceptance, processing, or approval of applications or permits for such services or the facilities used to provide such

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26 *Third Report and Order and Declaratory Ruling* ¶ 140.

27 Smart Communities Petition at 5-12; New York Petition at 4-14.

28 Smart Communities Petition at 12-21.

29 *AT&T Corp. v. Iowa Utilities Board*, 525 US 366, 377-78 (1999).

30 *See TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 n.11 (11th Cir. 2001); *see also N.Y. State Thruway Auth. v. Level 3 Commc'ns, LLC*, 734 F. Supp. 2d 257, 265 (N.D.N.Y. 2010).

services."[31] The Commission appropriately extended this finding to *de facto* moratoria that are not formally codified but effectively preclude deployment in the same manner as an express prohibition, and similarly pointed to specific examples of these types of moratoria in the factual record.[32]

While Smart Communities suggests that the examples of moratoria cited by the Commission are more in the nature of seasonal or temporary restrictions on construction that do not prohibit deployment,[33] the record makes clear that the Commission relied on numerous examples of more egregious conduct by state and local governments that "prohibit or have the effect of prohibiting" the deployment of telecommunications services or facilities in violation of Section 253(a).[34] Moreover, the Commission was careful to distinguish the types of express or *de facto* moratoria that violate Section 253(a) from "state and local actions that simply entail some delay in deployment."[35] It also made clear that a regulation is not considered a moratorium when the state or local government allows for "alternative means of deployment in a manner that is reasonably comparable in cost and ease."[36] In short, the Commission took a nuanced approach in which reasonable state and local regulation is permitted and preemption is reserved for situations where a state or local government has essentially eliminated meaningful opportunities for the deployment of facilities that could be used in providing telecommunications services.

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31 *Third Report* and *Order and Declaratory Ruling* ¶ 147.

32 *Id*. ¶ 149.

33 Smart Communities Petition at 2-3, 11-12.

34 *Third Report* and *Order and Declaratory Ruling* ¶¶ 143, 145-46, 149-50 (citing examples in the record of localities refusing to accept or process applications for wireless siting facilities, or imposing years-long delay in doing so).

35 *Id.* ¶ 150.

36 *Id.* ¶ 152.

Similarly, the Commission provided a sound explanation for why the prohibited types of moratoria are not protected under the limited exceptions in Sections 253(b) or (c). The Commission explained that the four public interest exceptions identified in Section 253(b) are unlikely to be applicable in the context of express or *de facto* moratoria.[37] In particular, the Commission correctly concluded that moratoria will almost never be "necessary" to "protect the public safety and welfare" pursuant to Section 253(b) because there generally will be more narrowly-tailored options for protecting the public without the total elimination of deployment opportunities.[38] Along the same lines, the Commission explained that moratoria that bar providers from accessing the right-of-way cannot be saved under Section 253(c) because that provision is intended to protect regulation governing the time, place, and manner of construction, but not regulation that precludes such access completely.[39]

CONCLUSION

For all the reasons described above, the Commission should reject CCU's request to impose unwarranted obstacles in connection with overlashing. The Commission also should reject the New York and Smart Communities Petitions and reaffirm its decision that state and local express and *de facto* moratoria are prohibited by Section 253.

Respectfully submitted,

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November 9, 2018

[37] *Id.* ¶¶ 155-56.

[38] *Id.* ¶ 158.

[39] *Id.* ¶ 160.